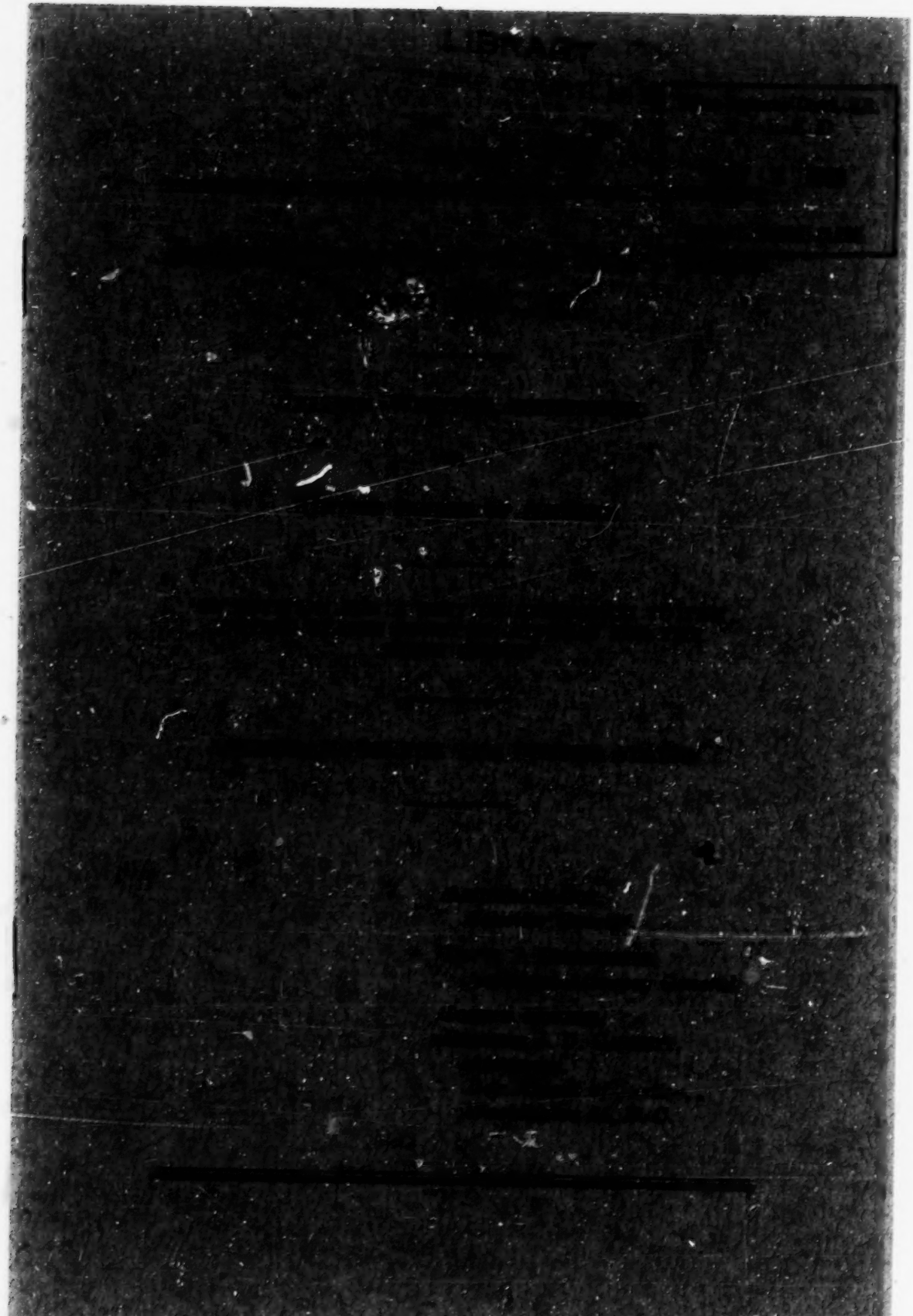

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 966

LILLIAN WINTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 42a-49a)[1] is reported at 200 F. Supp. 157. The Court of Appeals filed no opinion, but its order (Pet. 14) affirming the judgment of the District Court is reported at 312 F. 2d 749.

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[1] Record references are to the appendix to the taxpayer's brief filed in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1963. (Pet. 14.) The petition for a writ of certiorari was filed on March 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the courts below correctly held that federal tax liens upon the cash surrender value of life insurance policies, which were assigned, subsequent to the assessment of the taxes, as security for a bank loan, could be satisfied out of the proceeds of the policies that remained after the obligation to the bank had been paid.

2. Whether the courts below erred in holding that, under Section 3670 of the Internal Revenue Code of 1939, a lien in favor of the United States attaches upon the property of the taxpayer upon his failure to pay the entire tax after demand.

3. Whether the courts below erred in holding that the Tax Court's determination that petitioner was not liable for her deceased husband's unpaid income taxes as transferee of his assets did not bar a subsequent lien enforcement action against her as holder of the cash surrender value of insurance policies subject to a lien in favor of the United States.

STATUTES INVOLVED

The pertinent portions of Sections 311, 3670, 3671 and 3672 of the Internal Revenue Code of 1939; Section 6215 of the Internal Revenue Code of 1954; and Sections 3911.10 and 3911.12 of Page's Ohio Revised Code Annotated appear in the Appendix, *infra*, pp. 9-12.

STATEMENT

Alex S. Wintner died on June 8, 1954. At the time of his death, Mr. Wintner held eight policies of insurance on his life, all in favor of Lillian Wintner, his wife and petitioner here, as beneficiary. The face amounts of the policies totaled $87,500, and the cash surrender values at his death totaled $34,503.85. Under the terms of each of the policies, Mr. Wintner retained the right to change the beneficiary, to borrow against the cash value and to assign the policy. (R. 10a-12a, 43a.)

For the taxable year 1946, Mr. Wintner filed his federal income tax return reporting an income tax liability in the amount of $35,243.53, but paid therewith only $243.53. On April 21, 1947, the Commissioner of Internal Revenue made an assessment against Mr. Wintner in the amount of $35,000, the unpaid balance with respect to his 1946 income tax. The assessment was certified to the Collector of Internal Revenue at Cleveland, Ohio, who received it on the same date. On April 21, 1947, the Collector

gave Mr. Wintner notice of the assessment and demanded payment thereof. No notice of tax lien for the tax liability was filed in accordance with state law. No payment was made until September 7, 1951. Periodic payments were made thereafter until, on May 12, 1960, the amount outstanding on Mr. Wintner's 1946 tax liability was reduced to $8,034.04, plus interest. (R. 9a, 15a, 43a.)

At the time of his death, Mr. Wintner was indebted to the Union Bank of Commerce Company, Cleveland, Ohio, in the amount of $34,000 for sums he had borrowed from the bank at various times. On December 13, 1948, he executed a separate assignment to the bank of each of the eight life insurance policies as collateral for the payment of his indebtedness, each of which assignments was filed with the appropriate insurance company. (R. 10a-11a, 43a.)

On June 21, 1954, the Columbus Mutual Life Insurance Company, the insurer on two of Mr. Wintner's policies, paid $34,000 directly to the Union Bank of Commerce Company (thereby fully satisfying his indebtedness), and $6,009.60 (the balance of the proceeds of the two policies) to the petitioner. Shortly thereafter, the Union Bank of Commerce Company executed releases of the assignments of the six other policies, the proceeds of which ($48,533.32) were paid to the petitioner (who thus received an aggregate of $54,542.92 of proceeds from the policies). (R. 10a-11a, 43a.)

On April 17, 1956, the Commissioner mailed to petitioner a statutory notice of deficiency advising her that he proposed to assess against her, as transferee of assets of Mr. Wintner, pursuant to the provisions of Section 311 of the Internal Revenue Code of 1939, the tax liability here involved. (R. 3a-37a). Petitioner subsequently filed a petition in the Tax Court for a redetermination of the proposed deficiency. (R. 33a-34a.) On September 18, 1958, the Commissioner and petitioner filed in the Tax Court a stipulation that she was not liable under Section 311 as a transferee of the assets of Mr. Wintner (R. 40a), and the Tax Court entered its decision in accordance with this agreement (R. 40a-41a).

On January 14, 1960, the United States filed its complaint (R. 3a-6a) in the District Court against petitioner to enforce income tax liens, pursuant to Section 3670 of the Internal Revenue Code of 1939, on the cash surrender values of the life insurance policies previously referred to for unpaid income taxes assessed against Mr. Wintner in the amount of $8,321.80, plus interest. The District Court held that the United States, by virtue of its lien attaching to the cash surrender values of Mr. Wintner's insurance policies, was entitled to judgment for the amount of tax due, plus interest and costs, not to exceed the total cash surrender value of the policies at the time of Mr. Wintner's death. (R. 48a.) The Court of Appeals affirmed.

ARGUMENT

1. The principal question in this case is substantially the same as that presented in *Meyer* v. *United States*, No. 757, this Term, certiorari granted, March 4, 1963. In each case, the courts concluded that since the bank concerned had a claim against both the net proceeds of the policies payable at death and the cash surrender value, while the claim of the United States attached to the cash value only, the assets should be marshalled "upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds." See *Sowell* v. *Federal Reserve Bank*, 268 U.S. 449, 457. In *Meyer*, as here, the courts treated the bank's claim as having been paid out of the general proceeds of the policies, thereby permitting the federal tax claims to be satisfied out of the portion of the proceeds representing the cash surrender value. See *United States* v. *Bess*, 357 U.S. 51.

In view of the Court's action in *Meyer*, the Government does not oppose certiorari upon this question.

2. Petitioner also argues (Pet. 10-11) that no tax lien came into being under Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 9-10) because Mr. Wintner did not "neglect or refuse" to pay his tax after demand. The partial payments made by the taxpayer during his life are said to contradict any intent to neglect or refuse to pay the tax. The contention derives from an argument made by the taxpayer and left unanswered in *United*

States v. *Bess*, 357 U.S. 51, 55. But, whatever merit the argument may have in a different context,[2] it is not persuasive here. Indeed, except for a nominal payment of $243.53 made before demand, Mr. Wintner waited three and a half years after receiving notice of the assessment before making *any* payment on the remaining balance of $35,000. Certainly that delay constituted a "neglect or refusal to pay" within the meaning of the lien provision. And a refusal to pay a *part* of the tax is no less a "refusal" within the statute because a voluntary partial payment has already been made. Otherwise the lien could be defeated in every case by the simple expedient of making a nominal payment on filing the return.

In any event, since the question, though adverted to in this Court and in one district court opinion (*In re Crockett*, 150 F. Supp. 352 (N.D. Cal.)), has been decided here for the first time, we suggest it is not yet ripe for this Court's consideration.

3. Invoking Section 6215(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 11) and general principles of *res judicata*, petitioner finally argues (Pet. 11-13) that the Tax Court decision holding her not liable as a transferee under Section 311 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 9) precludes a subsequent action against her to enforce a lien. In our view, neither the statute nor the doctrine is disabling. The reason is the

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[2] Since the lien arises immediately upon demand, § 3671, Internal Revenue Code, 1939, and justifies a levy if unsatisfied ten days thereafter, §§ 3690, 3692, it is difficult to imagine a case where the argument would be plausible. A subsequent payment merely discharges the lien *pro tanto*. § 3674(b), Internal Revenue Code, 1939.

same in both instances. Section 6215(a) is concerned solely with the disallowance in whole or in part of a "deficiency" (see § 6211, Internal Revenue Code, 1954) claimed against a taxpayer or one liable as a transferee, while the present suit against petitioner merely seeks recovery from her as the holder of liened property. The lien enforcement proceeding constitutes a different cause of action. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598.

In any event, the problem is not recurring. The question arises here only because of the unique circumstance that the Tax Court proceedings were pending when this Court decided *Commissioner* v. *Stern*, 357 U.S. 39, and *United States* v. *Bess*, *supra*.

CONCLUSION

For the reasons stated, the United States does not oppose certiorari in the instant case, limited to Question 1.

Respectfully submitted,

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LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH KOVNER,
CROMBIE J. D. GARRETT,
Attorneys.

MAY 1963.

APPENDIX

Internal Revenue Code of 1939:

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refund):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * *

(f) *Definition of "Transferee."*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(26 U. S. C. 1952 ed., Sec. 311.)

* * * *

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the

amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

26 U. S. C. 1952 ed., Sec. 3672.)

* * * *

Internal Revenue Code of 1954:

SEC. 6215. ASSESSMENT OF DEFICIENCY FOUND BY TAX COURT.

(a) *General Rule.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.

(26 U. S. C. 1958 ed., Sec. 6215.)

* * * *

Page's Ohio Revised Code Annotated:

§ 3911.10 EXEMPTION OF PROCEEDS FROM CLAIMS OF CREDITORS.

All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the wife or children, or any relative dependent upon such person, or any creditor, or to a trustee for the benefit of such wife, children, dependent relative, or creditor, shall be held, together with the proceeds of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant. * * *

* * * *

§ 3911.12 POLICY ASSIGNED TO A MARRIED WOMAN.

A policy of insurance on the life of any person, or any interest therein, assigned, transferred, or made payable to a married woman, or to any person, firm, or corporation in trust for her or for her benefit, whether such transfer is made by her husband or by another person, shall inure to her benefit independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors.

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